IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs February 26, 2009

RUTH ISAACS v. SUSAN COMPTON

Appeal from the Circuit Court for Carter County
No. C9659 Thomas J. Seeley, Jr., Judge

No. E2008-00633-COA-R3-CV - FILED APRIL 21, 2009

Ruth Isaacs ("Plaintiff") sued Susan Compton ("Defendant") for breach of contract. The case was tried before a jury, and the Trial Court entered a Final Judgment on the jury's verdict that Defendant had breached the contract and owed Plaintiff $368,613.71. Defendant filed a motion for judgment notwithstanding the verdict, remittitur, or, in the alternative new trial. The Trial Court granted remittitur reducing the judgment to $300,000.00, and denied the remaining motions. Defendant appeals to this Court. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and JOHN W. MCCLARTY, J., joined.

Thomas R. Banks, Elizabethton, Tennessee for the Appellant, Susan Compton.

Randall E. Sermons, Johnson City, Tennessee for the Appellee, Ruth Isaacs.

OPINION

Background

Plaintiff leased land at 710 West Elk Avenue in Elizabethton, Tennessee. In 1995, Plaintiff built a building on the property and began operating a Dairy Queen at this location. In June of 2004, Plaintiff lost the Dairy Queen franchise. Plaintiff then decided to sell the business, which included the building. She entered into negotiations with Mike Harris, who owned another Dairy Queen, to purchase the building for $300,000. Before Plaintiff and Mr. Harris reached a final agreement, Defendant made an offer to Plaintiff to purchase the business for $300,000. Plaintiff accepted Defendant's offer and the parties entered into a written Agreement to Sell Business ("the Contract").

The Contract provided that Defendant was purchasing "the business of a fast food restaurant now being operated at 710 West Elk Avenue, Elizabethton, TN and known as The Dairy Queen and all assets and liabilities." The Contract further provided, in pertinent part:

> 3. The total purchase price for the aforementioned business, assets, and liabilities is $300,000.00 (Three hundred thousand US dollars).
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> a. Buyer acknowledges that application has been made for financing up to 100%.
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> b. In the event 100% financing is not available for this asset purchase, Seller is willing to consider owner financing not to exceed $100,000.00 to be paid by a note of the Buyer to the Seller, bearing interest at the rate of 6 percent annum amortized over 10 years with an option of the Buyer to make larger monthly principal payments with no prepayment penalty. Monthly payments will begin 90 days after assumption of the business.
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> 4. Consummation of the sale, with payment by the Buyer of no less that [sic] $200,000.00 and execution of a note of the Buyer to Seller of no more than $100,000.00 and delivery by the Seller of a Bill of Sale, will take place on or before October 1, 2004.
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> 5. The Seller agrees to allow the Buyer to assume operation of the business on July 1, 2004 at 12:01 A.M. Seller agrees to deliver the business and all assets in the same condition that it is now, reasonable wear and tear expected.
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> * * *
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> 7. The Seller agrees that this Agreement is contingent upon the following: (a) Buyer obtaining assignment of lease on said property, (b) Buyer obtaining financing as outlined above.

Pursuant to the Contract, Plaintiff delivered possession of the building to Defendant on July 1, 2004. Defendant formed Twisters Eats and Treats, LLC ("Twisters") and began running Twisters at the 710 West Elk Avenue location. The lease for 710 West Elk Avenue was assigned

to Defendant in August of 2004. Twisters closed in March of 2005, and at that time Defendant stopped paying the lease, the insurance on the building, and the suppliers. Defendant never paid Plaintiff pursuant to the Contract. Plaintiff sued Defendant for breach of contract and the case was tried before a jury in August of 2007.

At trial, Plaintiff testified:

> when [Defendant] was in town she always stayed at my house, as did the rest of the family, her sister and brother. They were like family and I trusted her. And like you said, she was going to give my daughter and my daughter-in-law a job and I trusted her.

When asked how she and Defendant entered into negotiations, Plaintiff testified: "She came to town. My daughter-in-law had told her that I was selling the business, and she came to town and said she wanted to buy it, that she could have me $300,000.00 here in three days."

Plaintiff testified that Defendant never told her she was unable to obtain financing. Plaintiff testified that when they talked about financing, Defendant told Plaintiff: "She was waiting on the bank, the paperwork to be concluded." Plaintiff testified that based upon what she saw, Defendant was running the business. Plaintiff stated: "She changed the menus, put up new signs. She was in there, when she was in town she was in there with the employees, instructing them on how to, what to do." During the time Defendant operated the business, Defendant paid the lease, the utilities, and the suppliers, but Plaintiff continued to make the payments on the bank note for the building. Plaintiff testified that in September of 2004, Defendant purchased a house in Johnson City for "around $280,000.00."

Plaintiff testified that in December of 2004, she became worried and stated: "I had to put money into the store to keep it operating." Plaintiff testified that she put this money into the business because her daughter, Teresa Caldwell, the manager of Twisters, told Plaintiff that Defendant was not putting money into the business. When explaining why she put her own money into Twisters, Plaintiff testified: "I had no other choice. I still had a bank note. I still had the rent to do if she wasn't, if she didn't."

In April of 2005, Plaintiff paid the bank note as she had been doing all along and also began making the payments for the lease and insurance on the building. Plaintiff then reopened the business under another name to help pay the bills. When Plaintiff reopened the business, she had to pay outstanding bills from Pet Dairy, Gordon Food Service, Department of Health Inspections, Earthgrains Bakery, JanPak, and PFG incurred when Defendant was running Twisters. Plaintiff also had to pay to have the electricity, water, phone, and gas turned back on in order to reopen. Plaintiff testified that if Defendant didn't pay the ground lease, then Plaintiff was responsible, and if the lease was not paid, Plaintiff would lose the building. Plaintiff operated the new business until January of 2007 and then closed it because it was not making a profit. Plaintiff testified that she still owed approximately $242,000 on the building. Plaintiff testified: "Financially I'm broke. I will have to sell my house in order to pay the bank note."

Plaintiff was asked if she took steps to contact Defendant when she became aware of problems in December of 2004, and Plaintiff stated "I could never get in touch with [Defendant].…She wouldn't answer my phone calls."

Teresa Sue Caldwell, Plaintiff's daughter, testified at trial. Ms. Caldwell worked at her parents' fast food restaurant beginning when she was thirteen and has worked in the fast food industry for "20 some years."[1] Ms. Caldwell testified that in July of 2004, she was working in a drug store when Defendant asked her to come run Twisters with Ms. Caldwell's sister-in-law, Ann, who also is Defendant's sister. Ms. Caldwell began working for Defendant at Twisters in July of 2004.

Ms. Caldwell testified that Defendant was making the decisions about how Twisters was run. Ms. Caldwell testified:

> [Defendant] changed the name. She put all new signs, two new signs actually. She painted a few things. She put out lamp posts. She redid, redid the menu, the full menu. She bought totally new uniforms for all the employees.… She had employee conferences.

Defendant also moved the banking for Twisters to another bank. Ms. Caldwell and Defendant's sister, Ann, ran Twisters together for a couple of months. Ann then decided that she did not want to work there anymore and left for another job. Ms. Caldwell then took over managing Twisters by herself. Defendant continued giving Ms. Caldwell instructions regarding running Twisters until the business closed in March.

Duncan I. Street, a loan officer at Carter County Bank, testified that Defendant applied to Carter County Bank for a loan of $300,000 for her business. Mr. Street testified that Plaintiff introduced him to Defendant in October of 2004, and that Defendant applied for the loan and provided Mr. Street with a financial statement and an appraisal on a parcel of real property in Florida. Mr. Street testified that he requested a tax return, which Defendant later provided to him, and that he and Defendant discussed her credit report, a business plan, a proforma for a balance sheet, and a P & L on the new venture.

When asked if he ever turned down the loan Defendant applied for, Mr. Street testified:

> Well, according, when I went back to pull the file, I, I've kept this in a pending file. I don't have information. If we deny a loan request we have to do what's called an Adverse Action Form. I could not locate an Adverse Action Form, but I did not make any notes in the file as far as whether I had turned it down or conditioned it.

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[1] Ms. Caldwell testified that she was an "owner and partner" in the Dairy Queen. Plaintiff, however, testified that Plaintiff alone "owned the business on paper.…"

Mr. Street testified that if he had issued an Adverse Action Form, the file would no longer have been classified as pending. Mr. Street was asked if he would have granted Defendant the loan based upon the information that he had in the file and he stated: "Based on the appraisal that I had and the information on the credit report, no, that would have been insufficient collateral." Mr. Street testified that he had notes in the file that he was waiting "for a business plan in regards to a proforma balance sheet and PNL [sic]," but that he never received this information.

Defendant testified at trial that she lives in San Diego, California and has lived there for approximately three years. She moved away from east Tennessee in December of 2004. Defendant testified that she is a licensed nurse who works for retirement facilities. She has worked in this career for twenty-five years.

When asked how she became involved in the purchase of the business at issue, Defendant testified:

> Well, my sister, Ann and I are very close, and she was in the process of going through a divorce. And we would talk quite frequently. And I had moved up to Tennessee working on some other business as a Nursing Home Administrator, and I started looking, because I missed Tennessee. I missed living here; I grew up here. So I started looking for a, a home here. And I had put a contract in on a property in Happy Valley.
>
> And then Ann told me that the Dairy Queen had come in and stripped them of their franchise, and that they were probably going to lose the store. And I felt bad and I asked Ann, I said, "Well, what's going on?", and she said, "Well, Ruth is trying to sell the store and, and she's talking with somebody". I said, "Well, let me talk with Ruth." So I went and I had a conversation with Ruth and I asked what the, the offer of the property was and everything, and so Ruth told me. And I said, well, I said, "You know, can I buy the property?" And she said, "Well, yeah". And I said, you know, "I think I can get the financing." I said, "I have a good credit score", and I said, "I can use my home as collateral." And so she said okay. My other sister, Leslie was a previous realtor and her husband is an appraiser. And they lived in Johnson City. So I went to Leslie and I said, you know, I don't have a lot of money, so we got up this contract.

When asked about the lease, Defendant testified:

> Well, I had to meet with [Plaintiff] because I didn't really understand the lease part of it, because I'd never dealt with property that the building owned by one person and the land owned by another person. And it was - the only way that I could even pursue anything to do with the business was I had to have the lease first. So the cart had to come before the horse, and I knew I was taking a big risk, but I really felt like that I could do this and that I could get the financing. So I contacted a group in New York and I, I can't think of the name of them right now…. Well, it took them about a month, and I had to submit to them all kinds of information. They needed money

> up front so I had to pay two months of rent up, in advance. I had to pay a security deposit almost to the tune of $10,000.00. And again, I knew that was a chance, but that was the only way. They would not pursue the lease [sic] or anything unless I had the lease in my name first.

When asked about her attempts to obtain financing, Defendant testified:

> I had been working with a gentleman out of San Diego. He basically had loaned us money in the past and worked with us on other deals, and - And Peter Blough … and I had talked with him and shared with him what I wanted to do, and he said, "Oh, that sounds great. No problem." I had to submit a financial statement to him. I had to submit my appraisal on my property. I had to submit to him information, financials, tax returns, all kinds of information. It was like every day it was more that he was wanting. So it was just like any bank, just going through a process.

Defendant testified that Mr. Blough was a hard money lender meaning "it's a higher interest rate, but it's supposedly easier to get the funding." Defendant testified that she was not able to get financing through Mr. Blough because "[b]asically his lenders didn't feel like that I had enough collateral. That because the land was not owned by the person selling it to me, they said that it was too high of a risk for them to loan me the money. The building itself was not enough collateral."

Defendant testified that after she found out that she could not obtain financing through Mr. Blough:

> I was staying at [Plaintiff's] house, and like she said, we were family. She always let me stay at the house with her. We talked daily at breakfast; she'd cook me breakfast. In the evenings I'd come home and we'd talk. And so through this whole process I was talking with her, I was sharing with her the difficulties I was having. I explained to her that they were asking for additional information. They asked for financials. They then wanted the appraisal on my home. So I continuously had the conversations in regards to this.

Defendant testified that when she told Plaintiff that she was unable to obtain financing from Mr. Blough, Plaintiff took Defendant to Carter County Bank and introduced Defendant to Mr. Street.

With regard to the loan she applied for at Carter County Bank, Defendant testified:

> Basically, I had to fill out a financial application, or a loan application. Duncan asked me for financial statements and wanted a business plan. I e-mailed him the financial statements, along with the business plan and the finances, financials on the Dairy Queen. And I called him the following 'cause Ruth had asked me and I said, "Well, let me see". She says, "Have you heard anything?" I said "no". I said, "Let me call Duncan". Duncan says, "I'm waiting on the board to meet", and I just assumed that that was a board that he worked for. I called him another week later, which would make it like the second week of October, and I asked him and he said

> that they were going to convene that day and he would let me know. Probably around, later that afternoon I called him and he said based upon my financials, based upon my appraisal and based upon what collateral I had that he could not make the loan for me.… He said if I could come up with more collateral, that maybe he could, but I, I had no more collateral.

Defendant testified that she never received anything in writing from Carter County Bank, but simply talked with Mr. Street on the telephone.

Defendant testified that she then called Greene County Bank and that they told her "they would not write up a loan on this property." Defendant testified that she told Plaintiff and stated:

> I lived right there with her. And my sister, Leslie and I sat at the kitchen table with her and had a[n] afternoon snack and we talked about it, and I felt terrible. I mean, I thought that I could get the financing. I had no idea that the banks, you know, were that stringent.

When asked about when she told Plaintiff she could not obtain financing, Defendant testified:

> The whole time this was going on from August, September, October. 'Cause we did, we talked; she'd ask me and I'd tell her. He's wanting more information. At the end of, or middle of October when I talked to Duncan I explained to her that he wouldn't give me a loan. I made one last effort with Greene County. I explained that to her. I kept telling her, but it wasn't, it was like she didn't want to hear what I had to say.

Defendant testified that she set up the business of Twisters and operated it for a while and that during that time, the LLC paid the bills and the lease payments. Defendant testified that when the LLC was terminated, no money remained at the time of the winding up. When asked why she formed Twisters Eats and Treats, LLC, Defendant responded: "I was intending on buying the, the - purchasing the property and setting up a corporation to run the business." Defendant also stated: "My intention was to help my sister and, and Teresa, I mean, as family, whatever I could do 'cause I felt bad for my sister."

Defendant further testified that after the deal fell through:

> In December, it was like [Plaintiff] was not listening to me, so I called a meeting at my accountant's office in Johnson City, Bob Weaver, with [Plaintiff], with Teresa, myself and my older sister to explain to her that I could not get the financing and that we had two options, one the building closed, or two, that she had to sell it to somebody else. Mr. Weaver at that time even offered her some brokers and some real estate agents to, to do it with. And when she left that day, she said that it's my problem.

When asked why she took a loss for Twisters on her 2004 income tax returns when her position is that the sale never occurred, Defendant stated: "You know, my accountant does the taxes. I'm not an accountant and tax expert so I couldn't tell you. I didn't prepare them."

Defendant testified that she purchased a house in Florida in 2001, and refinanced it in July of 2004 for $635,000. In September of 2004, Defendant purchased a house in Johnson City for $289,000 and obtained 100% financing for this purchase. Then, in March of 2005, Defendant became a 50% owner of a house in California with a mortgage of $820,000.

After trial and the return of the jury's verdict, the Trial Court entered a Final Judgment on September 26, 2007 on the jury's verdict that Defendant breached both the Contract and the ground lease and that Defendant owed Plaintiff $368,613.71. Defendant filed a Motion for Judgment Notwithstanding the Verdict seeking a directed verdict in favor of Defendant, remittitur of the jury verdict, or, in the alternative, a new trial. Defendant argued in her motion that Plaintiff had failed to mitigate her damages, that Plaintiff's damage calculation had improperly included items personal to Plaintiff, and that the jury had failed to take into account that Plaintiff occupied and utilized the property from September of 2005 to January of 2007 and had charged rental to Defendant for that time period as part of the verdict. By order entered February 26, 2008, the Trial Court granted remittitur reducing the judgment to $300,000.00, and denied Defendant's remaining motions. Defendant appeals to this Court.

Discussion

On appeal, Defendant failed to comply with Tenn. R. App. P. 27, which provides, in pertinent part:

> **Rule 27. Content of Briefs. –** (a) Brief of the Appellant. – The brief of the appellant shall contain under appropriate headings and in the order here indicated:
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> * * *
>
> (4) A statement of the issues presented for review;
>
> * * *
>
> (7) An argument, which may be preceded by a summary of argument, setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefore, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on;….

Tenn. R. App. P. 27.

Defendant failed to provide a statement of the issues in her brief on appeal. As such, we are unsure exactly what issues Defendant is attempting to raise on appeal. As best we can tell

from Defendant's brief, Defendant is complaining that the Trial Court: 1) failed to properly instruct the jury; and, 2) failed to direct a verdict for Defendant. We, therefore, will address these issues.

First, we consider whether the Trial Court erred by failing to properly instruct the jury. In pertinent part, Tenn. R. App. P. 3 provides:

> Provided, however, that in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.

Tenn. R. App. P. 3(e). This issue regarding the alleged failure to properly instruct the jury was not raised in Defendant's motion for new trial and, thus, was waived.

Further, Defendant failed in her brief on appeal to point to any place in the record on appeal showing that Defendant ever objected to the jury instructions or that Defendant proposed other jury instructions which the Trial Court did not give. Rule 6, of the Rules of the Court of Appeals provides, in pertinent part:

> No complaint of or reliance upon action by the trial court will be considered on appeal unless the argument contains a specific reference to the page or pages of the record where such action is recorded. No assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded.

R. Ct. App. 6(b).

For good cause, this Court may suspend the requirements of the rules, "[h]owever, the Supreme Court has held that it will not find this Court in error for not considering a case on its merits where the plaintiff did not comply with the rules of this Court." *Bean v. Bean*, 40 S.W.3d 52, 54-55 (Tenn. Ct. App. 2000). This is not an appropriate situation for this Court to suspend these requirements. Defendant's issue regarding the Trial Court's alleged failure to properly instruct the jury is without merit.

We next consider whether the Trial Court erred when it failed to direct a verdict for Defendant. Our Supreme Court discussed an appellate court's standard of review applicable to a motion for a directed verdict in *Johnson v. Tennessee Farmers Mut. Ins. Co.*, stating:

> In reviewing the trial court's decision to deny a motion for a directed verdict, an appellate court must take the strongest legitimate view of the evidence in favor of the non-moving party, construing all evidence in that party's favor and disregarding all countervailing evidence. *Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815,

> 819 (Tenn. 2003). A motion for a directed verdict should not be granted unless reasonable minds could reach only one conclusion from the evidence. *Id*. The standard of review applicable to a motion for a directed verdict does not permit an appellate court to weigh the evidence. *Cecil v. Hardin*, 575 S.W.2d 268, 270 (Tenn. 1978). Moreover, in reviewing the trial court's denial of a motion for a directed verdict, an appellate court must not evaluate the credibility of witnesses. *Benson v. Tenn. Valley Elec. Coop.*, 868 S.W.2d 630, 638-39 (Tenn. Ct. App. 1993). Accordingly, if material evidence is in dispute or doubt exists as to the conclusions to be drawn from that evidence, the motion must be denied. *Hurley v. Tenn. Farmers Mut. Ins. Co.*, 922 S.W.2d 887, 891 (Tenn. Ct. App. 1995).

Johnson v. Tennessee Farmers Mut. Ins. Co., 205 S.W.3d 365, 370 (Tenn. 2006).

After hearing all the evidence, the jury found that Defendant had breached the Contract. Defendant does not argue that there was no material evidence to support the jury's verdict. The record reveals that the jury was presented with material evidence to support their verdict. Taking the strongest legitimate view of the evidence in favor of Plaintiff, construing all evidence in Plaintiff's favor, and disregarding all countervailing evidence, as we must, we hold that there was no error in the Trial Court's denial of Defendant's motion for directed verdict.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, Susan Compton, and her surety.

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D. MICHAEL SWINEY, JUDGE